STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Citizens Utility Board, Citizen Action/Illinois, and AARP	))))	
vs.	)	
	)	No. 08-0175
Illinois Energy Savings Corp., d/b/a U.S. Energy Savings Corp.	)))	
Complaint pursuant to 220 ILCS 5/19-110 or 19-115	))	

<u>PUBLIC REDACTED</u>
INITIAL BRIEF OF THE STAFF OF THE
ILLINOIS COMMERCE COMMISSION

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NOW COMES Staff of the Illinois Commerce Commission ("Staff"), by and through its counsel, pursuant to Section 200.830 of the Illinois Commerce Commission's ("Commission") Rules of Practice (83 Ill. Adm. Code 200.830), and respectfully submits its Initial Brief.

I. Introduction

On March 3, 2008, the Citizens Utility Board ("CUB"), Citizen Action/Illinois, and AARP filed a Verified Original Complaint against Illinois Energy Savings Corp. d/b/a U.S. Energy Savings Corp. ("USESC" or "Company"). On December 3, 2008, CUB and AARP (collectively, "Petitioners") filed a Verified First Amended Complaint ("Complaint"), which removed Citizen Action/Illinois as one of the parties. In this Complaint, Petitioners alleged, among other things, violations of the Alternative Gas Supplier Law (220 ILCS 5/19/100 *et seq*.) ("AGS Law") of the Public Utilities Act ("PUA"), the Illinois Consumer Fraud and Deceptive Business Practices Act (815 ILCS

505/1 *et seq*.) ("CFA"), and the Illinois Deceptive Trade Practices Act (815 ILCS 510/1 *et seq*.) ("DTPA").

CUB, USESC, and Staff all filed testimony in this matter, and an evidentiary hearing was held on October 14, 15, and 16, 2009. The following individuals submitted testimony on behalf of CUB: Lucy Jodlowska (CUB Ex. 1.0), Sandra Marcelin (adopted by Aimee Gendusa-English) (CUB Exs. 2.0, 5.0, and 9.0), Catherine Vargas (CUB Exs. 3.0 and 6.0), Alex Zermeno (CUB Exs. 4.0 and 7.0), Barbara Alexander (Consumer Groups ("CG") Exs. 1.0, 2.0, and 3.0), and Bryan McDaniel (CUB Ex. 8.0). Jim Agnew submitted testimony on behalf of Staff in ICC Staff Exs. 1.0 and 2.0. The following individuals submitted testimony on behalf of the Company: Gord Potter (USESC Exs. 1.0 and 5.0), Frances Findley (USESC Ex. 2.0), William Nicholson (USESC Ex. 3.0), and Steven Hames (USESC Ex. 4.0).

Staff believes that this proceeding should consider complaints made against USESC during the timeframe from January 2007 through March 2008 ("Complaint Period"). Staff's Initial Brief focuses on this timeframe, unless otherwise specified. Staff's testimony, with respect to its own internal complaints, also addresses this timeframe. In Staff's view, any remedial efforts made after this timeframe by the Company to address these or similar complaints offset any penalties or remedies assessed to the Company; such remedial efforts should not, however, excuse or mitigate any violations of the PUA, CFA, or DTPA committed by the Company. Staff will only address Counts IV, V, and VI of Petitioners' Complaint and their respective remedies and recommendations in this Initial Brief.

II. COUNT IV – Violations of the AGS Law

Count IV of the Complaint alleges in Paragraph 26(a) that USESC has violated certain provisions of the AGS Law. Specifically, Paragraph 26(a) on page 10 of the Complaint provides:

> 26. USESC has violated the Alternative Gas Supplier Law, 220 ILCS 5/19-100 et seq. as a result of:
>
> a. USESC'S continuing and fraudulent business practices violate its obligation under 220 ILCS 5/19-115(b)(2) and 220 ILCS 5/110(e)(1) to maintain sufficient managerial resources and abilities to serve its customers.

Staff opines that the evidence in this proceeding supports CUB's allegation in Paragraph 26(a) of the Complaint. Based upon the patterns of complaints received by third parties and the common content and volume of consumer contacts handled by Staff for the Complaint Period, it is Staff's view that USESC violated or failed to comply with the managerial requirements of Sections 19-110 and 19-115 of the AGS Law. (ICC Staff Ex. 2.0, pp. 3-4)

A. Argument

Section 19-110(e)(1) of the AGS Law requires that an applicant for a certificate of service authority for alternative gas supply service must possess "sufficient… managerial resources and abilities to provide the service for which it seeks a certificate of service authority." (220 ILCS 5/19-110(e)(1)) In determining the required level of resources and abilities, the AGS Law requires the Commission to consider "the characteristics, including the size and financial sophistication of the customers that the applicant seeks to serve…" (Id.) An applicant's managerial resources and abilities, therefore, must be sufficient to provide service to the customers it seeks to serve, taking into consideration the size and financial sophistication of its customers.

Section 19-115 of the AGS Law also requires an alternative gas supplier to "*continue to comply* with the requirements for certification stated in Section 19-110." (220 ILCS 5/19-115(b)(2)) (emphasis added) Thus, for a certificated alternative gas supplier, such as USESC, to remain in compliance with the AGS Law, the alternative gas supplier must continue to possess sufficient managerial resources and abilities to serve its customers, taking into consideration their size and financial sophistication. As indicated throughout the testimony in this case, USESC serves residential and small businesses customers in the service territories of Peoples Gas Company, North Shore Gas Company, and Nicor Gas Company. Consequently, it is Staff's position that in order to remain in compliance with its certification requirements, USESC must possess managerial resources and abilities sufficient to ensure that *the customers it seeks to serve* understand the service to be provided and are otherwise appropriately served, particularly given the manner in which the Company conducts its sales and the product it sells to residential and small business customers. Staff has identified three failures to possess managerial resources on the Company's part to properly serve its customers: 1) failure to manage its sales force, 2) failure to track and respond to direct complaints, and 3) failure to structure proper retention efforts.

1. Failure to Manage Sales Force

In testimony, Staff identified serious concerns about the Company's failure to manage its door-to-door sales force to ensure that consumers are not deceived, misled or otherwise confused about the offerings of the Company. (ICC Staff Ex. 1.0, p. 9-10; ICC Staff Ex. 2.0, p. 1) A fundamental aspect of providing alternative gas supply service and satisfying the certification requirements discussed above is having Company management ensure that its sales representatives successfully explain service terms and conditions to consumers. USESC's testimony in this proceeding is contradictory with respect to whether management recognizes this role of the Company in consumer education. At hearing, Company witness Potter appears to admit that the Company's role includes providing consumer education, "… I think we have a role in insuring that consumers understand what they've bought … it's our role to make sure they [customers] understand products, names or questions, and that's part of the benefits of the door-to-door models usually…" (Tr. at 745/9) But again, at hearing, Mr. Potter's statements reveal ambivalence in taking ownership of that role:

> Well, I think that generally, just as a broad statement, I don't think it's our job to educate consumers on the market. It's their choice. Our job is to sell the product and to sell it well, but I'm a very big consumer education guy. I always have been. (Tr. at 745/15)

Management's ambivalence with respect to what role the Company, acting through its salespeople, has in explaining to potential customers the alternative gas supply market, in general, and its product, in particular, provides insight into one of the causes of repeated patterns of sales misrepresentations that have plagued this Company. Mixed messages from management as to the Company's duty to educate consumers may well translate to salespeople understanding that their focus should be to sell the product, not to educate consumers about the product's nuances or its place in the larger alternative gas supplier market. From Staff's perspective, it is difficult to conceive how the Company's fixed price product can be understood at all without some understanding of the fledgling supply market. In fact, the record in this proceeding identifies patterns of misrepresentations that relate directly to confusing and deceptive sales statements regarding both the Company's product and the role of the Company and its product in the gas market.

In direct testimony, Staff identified six general trends in customer contacts recorded by the Consumer Services Division ("CSD") during the Complaint Period regarding USESC that evidenced ongoing management failures by the Company to prevent misrepresentations of its representatives in both sales and billing. In particular, these trends indicate a failure of management to control the message of its sales force. (ICC Staff Ex. 1.0, pp. 5-7) First, consumers reported that they were promised or otherwise led to believe that they would save money on their natural gas bills by agreeing to take service with the Company. Second, customers indicated that the Early Termination Fee ("ETF") assessed by USESC was either not discussed at the point of sale or was much higher than expected and, in some instances, acted as a disincentive to the customer cancelling the contract. Third, consumers stated that USESC sales agents misrepresented themselves to be employees of a utility or misrepresented themselves to be employees of a government agency. Fourth, consumers reported that differences between the language spoken by the salesperson and that spoken by the customer led to confusion and possible deception in the sale. Fifth, consumers reported that they could not get USESC to cancel the service, despite repeated attempts to do so, or that they experienced long delays in achieving cancellation. Sixth, customers challenged the overall validity of the sale, with some of these reporting that slamming had occurred. In Staff's view, the Company failed to institute appropriate measures to correct the patterns of misrepresentations found in these six trends in consumer complaints. (ICC Staff Ex. 1.0, p. 8)

Moreover, Staff was concerned regarding the volume of complaints, explaining that:

> [l]arge volume by itself can simply arise as a byproduct of market share, and in such instances is likely to be associated with a variety of topics. Likewise, negative consumer contacts in isolated instances may not be an indication of a developing trend or concern. However, when heavy volume (relative to the particular industry or market) is paired with a repeated set of specific and similar allegations over a sustained period of time, the situation raises concerns of a systemic failure that needs to be identified and addressed on a system-wide rather than an individual basis. (Id., p. 7)

Staff testified that CSD received a large volume of complaints against USESC dealing with very similar consumer concerns over a sustained period of nearly four years. (Id., p. 8) Additionally, as the Company has conceded, this is not the first complaint of this nature against the Company and not the first time the Company has instituted changes aimed at correcting similar complaint trends. (USESC Ex. 1.0, p. 368; Tr. at 695/2 (Potter)); also see Assurance of Discontinuance and Addendum thereto between the Company and the New York Attorney General (Exhibits B and C to Staff's Motion to Take Administrative Notice))

Furthermore, Staff is cognizant of the fact that the complaints received by Staff reflect only a small percentage of consumers actually aggrieved. (ICC Staff Ex. 1.0, pp. 7-8) Taking into account the probability that many other consumers had similar concerns but did not pursue them, the allegations raised by the CSD complaints are cause for concern. Furthermore, the fact that CUB and other consumer advocates received similarly large numbers of the same types of consumer contacts regarding USESC gave Staff cause for alarm. (Id., p. 8) This similarity in the nature of complaint trends, coupled with a long history of unsuccessful attempts to correct them, leads Staff to the conclusion that only a mismanaged company would have continually failed in this regard. As Staff witness Agnew testified, "I would expect a company receiving such persistent, high volume attention from advocates and regulators to take active steps to reduce this flow and create new self-monitoring policies to ensure continuing compliance by its sales force and customer service." (Id.) This systemic failure to successfully identify and correct complaint trends is one reason Staff believes the Company does not possess the requisite managerial abilities and resources.

One problem contributing to the Company's failure to properly manage its sales agents derives from the contractual relationship between the sales force and the Company. USESC agents are independent contractors and enter into a contract with Energy Savings Marketing Corp. ("ESMC") to sell and market USESC products. (USESC Ex. 1, p. 8) ESMC also has an independent contractor relationship with USESC to recruit, train, and pay its independent sales agents. (Id.) During the Complaint Period, USESC had no actual managerial presence in Illinois, no employee who was directly or financially responsible for the Illinois sales officers. (ICC Staff Ex. 2.0, p. 10; CG Ex. 2.0, p. 26) Instead, USESC employs regional distributors who are responsible for day to day operations in each Illinois sales office, including recruitment, training sales agents, and reviewing reports. (USESC Ex. 3.0, p. 1; Tr. at 404/1 (Potter)) These regional distributors are also independent contractors who enter into contracts with USESC to generally run the local sales offices. (USESC Ex. 1.0, p. 8) This relationship allows each independent contractor to "make as much as you choose" and be the "owner of your own small business." (see USESC Ex. 5.8 BATES USE 21) The regional distributors have a similar contractual relationship and cannot directly supervise or discipline the independent contractors beneath them due to contractual obligations. They do not conduct any field training of their agents or test them in written form of their knowledge (Tr. at 83/8 (Hames); Tr. at 190/17 and 192/11 (Nicholson)); they do not know how consequences are imposed on sales contractors (Tr. at 93/1

(Hames); Tr. at 200/15 (Nicholson)) or levy any consequences on sales agents (Tr. at 113/12 (Hames); Tr. at 203/5 (Nicholson)); they cannot fire the agents (Tr. at 156/14 (Hames)); instead, they have to "get head office involved, CCR involved." (Tr. at 157/1 (Hames))

Additionally, the lack of presence and oversight of its sales force also contributes to the Company's failure to properly manage its sales force. After independent contractors are hired and trained, they are left to their own devices in the field. Even though they are specifically trained to be honest and not to promise savings to potential customers, they are susceptible to misconduct to garner themselves a maximum number of sales in order to earn the commissions and the bonuses. The Company concedes that it "does not monitor performance by attending at doors with contractors." (Id., p. 17, citing Company's response to CSD 1.06; also see Tr. at 453/2 (Potter)) Company witness Findley also admits that no one is at the door with the independent contractor and no one knows what is happening while the verification call is taking place. (Tr. at 356/12, 357/2) She further concedes that no one knows if there is interaction between the independent contractor and the customer during the verification call or if the independent contractor is making verbal signs or gestures to the customer during the verification call. (Tr. at 358/1) Furthermore, Company witness Potter admits that he cannot "identify any particular instances of field training or shadowing." (Tr. at 455/22) The extent and substance of the conversations between the independent contractor and customer are impossible to verify as Company witness Potter agrees, "Those kind of things you can't determine." (Tr. at 493/1)

Specifically, the verification calls during the Complaint Period were inadequate. The Company admitted that during the Complaint Period, it did not specifically ask customers specific questions regarding utility affiliation. When asked to agree that third party verifiers did not ask questions which would require customers "to specifically say, yes or no," Company witness Findley admitted, "Yes." (Tr. at 361/10) In fact, when asked about Ms. Vargas' third party verification, Company Ms. Findley conceded that the Company only reminded the customer about the utility non-affiliation after she had already confirmed her agreement; the third party verifier never asked Ms. Vargas in question form whether she agreed that USESC was not an affiliate of her gas company. (Tr. at 364/12) Staff recognized that the third party verification scripts need to include separate affirmations of what a customer is agreeing to and to truly verify that the customer understands the contract and the accuracy of the sales agent's presentation. (ICC Staff Ex. 2.0, p. 6) The reason for this is because of the inability of the Company to witness the interaction between the agent and the customer:

> I believe that the private conversation that has no recording that goes on before the third-party verifier is brought in, doesn't appear to have any means of being monitored. So you would have someone make representations during that conversation that – and it's also my understanding that quite often the sales agent has not left while the third-party verification is going on. So the sales agent is standing next to or over or somewhere in the proximity of the customer who is then participating in, I think there's been a variety of third-party verifications that the Company has used over time those have evolved. But I don't believe that just because the customer answers things affirmatively in a third-party verification, that automatically disqualifies the salesperson from having said anything off script. (Tr. at 914/3 (Agnew))

It is this unique one-on-one interaction and ensuing relationship between the independent contractor and customer which deserves scrutiny. With no substantial checks and balances on the potential for misrepresentation, abuse, and deception, coupled with the ability to earn commissions, the independent contractors have maximum incentives to take advantage of the door-to-door sales approach. There is maximum discretion and self-autonomy on the part of the contractors. Because "the presence of the agent may cause some undue influence over the customer" (Tr. at 974/14 (Agnew)) and no one besides the contractor is at the door during the sales presentation or in the presence of the customer during a verification call, there is no true way of knowing what has happened. Even Company witness Hames admits, "We're coming to them [the customers]… we know we're encroaching on their private space…" (Tr. at 138/2) Company witness Potter further states that "[d]oor-to-door sales is where you are bringing your product to a consumer…" (Tr. at 737/13) Company witness Findley further concedes that any misconduct would only be revealed through a consequential "fact-based investigation" wherein CCR might review the contract and the verification call. (Tr. at 356/14) This fact-based investigation, however, does not include an investigation of objective facts surrounding the interaction between the sales person and the customer, such as a review of audio or video recordings. Rather, the Company relies upon its subjective review and ultimately gives its sales representatives the opportunity to misrepresent this one-on-one contact. This unique relationship which is developed by the independent contractor, along with the autonomy of the sales representatives, unchecked by factually verifiable oversight, fosters an environment in which contractors can take advantage of customers who may be unfamiliar with competition and have not received any appropriate and truthful (or sometimes deceptive) explanation of what the Company is offering them. After all, Mr. Potter even concedes that "consumers are more easily confused and don't understand the choices in front of them." (Tr. at 745/3)

This lack of oversight, or presence, exists even at the regional distributor level; regional distributors are the closest things to managers that the independent contractors had during the Complaint Period. Company witness Hames admits that unless "[the contractors] make a mistake in front of [him] in the office during some training, [he] would correct it there; but nothing that maybe would happen in the field unless [he] was notified by CCR." (Tr. at 98/17) He goes on to admit that most of the times he would only hear about sales misconduct from the CCR department. (Tr. at 98/21) Mr. Hames even admits that an allegation of forgery might not have counted against a former contractor when he was made Hames' recruiter. (see CUB Cross Ex. 3 and Tr. at 155/12) Company witnesses Hames and Nicholson, as regional distributors, both testified that they were unaware of unapproved training materials found in their sales offices even though Company witness Potter concedes that unapproved documents were found at all Illinois sales offices. (Tr. at 118/3 (Hames); Tr. at 211/11 (Nicholson); Tr. at 462-468 (Potter)) Evidence shows that independent contractors have a great deal of discretion in how they handle the one-on-one interaction at the door with the customer. The environment is created by the independent contractor and with no oversight during the sales presentation, the environment becomes ripe for abuse.

Another contributor to the Company's failure to manage its sales force is the Company's failure to properly and effectively discipline its sales force after acts of misconduct or misbehavior. Even after a customer reports misconduct and a regional distributor is notified of it, the Company fails to properly discipline and punish contractor misconduct. As for disciplinary action, the Company indicated that the CCR Department is responsible for "overseeing compliance by sales contractors" and issuing "direction for remedial or disciplinary action" and monitoring the sales contractors' obligations to local, state, and federal laws. (USESC Ex. 1.0 p. 8-9; USESC Ex. 5.0, p. 11) The Company goes on to trivialize concerns expressed by Staff witness Agnew and CG witness Alexander regarding the effectiveness of the CCR Department being so far removed from the Company's sales agents. (Id.) The Company testified that the "CCR group is in a better position to investigate complaints and track the actions of sales contractors from a centralized location." (Id., p. 12)

Company witness Findley, the Manager of the CCR Group, further testified that if the CCR Department determined an allegation of agent misconduct to be valid, the CCR Department "not only recommend[s] (discipline), but implements" it as well. (Tr. at 263/1) Nevertheless, Company witness Potter conceded that the performance management matrix used during the Complaint Period (CUB Cross Ex. 4) established by the Company to apply to contractor misconduct was only a "guideline" and that "CCR has complete latitude to override that guideline" using a lot of "judgment." (Tr. at 494/5, 495/18) In fact, Company witness Findley admitted that she used her own "discretion" when she was herself a CCR specialist and had to apply the matrix to allegations of contractor misconduct. (Tr. at 319/18)

The CCR Department's exercise of its discretion is confirmed by CG Ex. 3.6 which shows that consequences to independent contractors misrepresenting material facts were small compared to validated instances of allegations made against the contractors. While discretion of CCR specialists is not per se indicative of bad management, discretion that results in weak action in light of serious misrepresentations and fraud is a serious failure of managerial oversight as it fosters repeated disciplinary problems. CG Ex. 3.6 demonstrates that the CCR Department consistently fails to recommend discipline and fails to implement it, contrary to the Company's statements.

In addition to lax enforcement of disciplinary measures, the Company does not effectively track such enforcement. In response to CUB data requests, the Company indicated that in 2007 and 2008, only 15 independent contractors received any consequences for validated complaints, 2 of whom were terminated and 1 of whom was suspended, while the rest were given less severe disciplinary actions. (CG Ex. 3.0, p. 25; CG Ex. 3.6; see Tr. at 490/2 (Potter)) Another response to a CUB data request indicated that the Company had terminated 30 contractors for misconduct in 2007. (CG Ex. 3.0, p. 26) Nevertheless, in response to Staff data requests, the Company indicated that 19 contractors were terminated in 2007. (CG Ex. 3.0, p. 25) These discrepancies illustrate that the Company does not keep sufficient record of disciplinary actions taken against its independent contractors which arguably contributes to its lax enforcement.

To further illustrate this failure to keep accurate enforcement records is Company witness Nicholson's delay in submitting at least one allegation letter back to CCR. This would perhaps demonstrate that as a regional distributor, it was not Mr. Nicholson's priority to properly administer and verify such administration of consequences levied against his independent agents. Mr. Nicholson admitted that there was a two month delay in sending the original consequence letter back to CCR (Tr. at 221/19) even though that is one of his responsibilities (Tr. at 213/8). Mr. Nicholson further admitted that it appeared as though the agent in question was still working. (Tr. at 218/1) When the regional distributor of a sales office is not strict in effectuating the entire process of disciplinary action against an independent contractor for misconduct – possibly even delaying administration of a consequence to a contractor – the sentiment in the sales office is that discipline is not a priority. When making sales and earning commissions is prioritized over proper behavior and accurate representation of material facts to potential customers, the environment remains ripe for abuse and misconduct.

2. Failure to Track Complaints

A second managerial failure identified by Staff is the Company's failure to adequately identify and establish any system to properly track and respond to trends encountered in its direct consumer complaints, despite a long history of similar third party complaint trends arising out of its door to door sales methodology. Instead, Staff noted that the Company appeared to rely upon receiving notice of third party complaints from entities like CSD or CUB to inform it of growing or continuing problems. (ICC Staff Ex. 2.0, pp. 1-2) Staff recommends that the Company develop an internal way to track direct complaints from customers, similar to the ways in which the Company tracks complaints regarding contractor misconduct through the allegation summary reports. (Id., p. 7) When asked in a Staff data request to identify "the number of complaints USESC received directly from customers through written notice, phone calls, or email," the Company responded, "USESC does not log customer contacts by category. USESC does not know of any reasonable method to obtain this information." (CUB Cross Ex. 13) When asked if this response was accurate, Company witness Potter only responded, "It's not accurate now." (Tr. at 490/8)

3. Failure to Structure Retention Efforts to Incent Appropriate Sales

A third managerial failure identified by Staff is the failure of the Company to structure its sales retention efforts to properly incent its sales force to avoid misconduct. (Id., p. 2) It is Staff's position that USESC's business model of door-to-door sales creates an environment ripe for individual misbehavior, abuse, and deception. In Staff's view, the sales retention efforts of the Company actually provide improper incentives because they also create substantial barriers that prevent customers from leaving after the sale, thus encouraging sales representatives to achieve a sale at any cost. As Staff explained, “it is reasonable to expect a company employing a door to door sales force which is compensated with an incentive payment structure similar to the Company’s payment structure to anticipate and take reasonable precautions against foreseeable problems.” (Id., p. 9)

Staff points out that the commission structure of the Company encourages misrepresentation by the sales force and opines that the Company’s efforts, during the Complaint Period, were insufficient to counter such incentives, in part because these efforts relied upon cancellation of the contract by the customer. The Company argues that its model of paying commissions to its sales agents instead of a salary does not encourage dishonest or misleading behavior at the point of sale. The Company points to a number of efforts it has made to countermand the incentives created by its sales payments. For instance, the Company states that it takes a “number of steps to deter that type of behavior” including keeping a “commission if the contract is later cancelled.” (USESC Ex. 3.0, p. 5) Nevertheless, Company witness Nicholson admits that that *****
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(USESC Ex. 3.0C, p. 4) ***
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*** (USESC Ex. 5.8C, BATES USE 106-107)

Furthermore, the Company argues that when a customer cancels the contract, there is a subsequent clawback of the contractor’s initial payment. This clawback, however, comes in the form of a deduction from a subsequent commission payment; it is not an amount that the contractor has to pay out-of-pocket. In other words, even though the contractor is penalized for a canceled contract, the clawback acts as a reduction in future earnings and not as an instant financial deterrent. Furthermore, as Staff pointed out in its testimony, the early termination fee a customer had to pay to cancel a contract during the Complaint Period acted as a barrier to cancellation, further skewing the incentives applicable to the sales agent. (ICC Staff Ex. 1.0, pp. 10-11) During the Complaint Period, this early termination fee was very high, creating a substantial barrier to termination, and was the source of a high level of consumer complaints.

In addition, the commission schedule applies to regional distributors as well in that their take home pay is increased by the number of contracts signed up by the sales agents in their sales offices. ** ** ***(ICC Staff Ex. 2.1C, BATES USE 30632) Company witness Hames testified that he manages “about 25 sales agents in the Chicago Loop office” (Tr. at 79/18). If all of his sales agents obtained 5 valid contracts each in one month, Mr. Hames, as the regional distributor, would receive ********** that month in initial payment commissions. If his sales agents obtained 10 valid contracts each in one month, he would receive **********. It is in everyone’s financial benefit to secure contracts. Meanwhile, Company witness Nicholson testified that he has “around 40 people currently” on his team of sales agents. (Tr. at 195/10) As regional distributor, Mr. Nicholson would receive ********** in initial payment commissions if all his sales agents obtained 5 valid contracts each in one month and ************ if his sales agents obtained 10 valid contracts each in one month. Mr.

Hames and Mr. Nicholson would not have to actively do anything to receive these sales commissions as regional distributors. As demonstrated, the financial benefit exponentially grows for everyone involved. It is reasonable to assume that this financial benefit to the regional distributors provides contrary incentives for these distributors to discipline sales representatives that profitably (although inappropriately through misrepresentation or fraud) sign up a large numbers of consumers. As a result of the financial incentives to the sales agents to misrepresent material facts in order to acquire a signed contract and the equally strong incentives for the managers to ignore inappropriately obtained contracts, coupled with no strong preventive measures in place to curb this behavior, an independent contractor can consistently misrepresent material facts during the sales presentation without fear of losing his job or losing his entire commission.

These failures to possess managerial resources result in violations of Sections 19-110 and 19-115 of the AGS Law.

B. Remedies

For the three managerial failures identified above, Staff recommends the following two options for remedial action, which may be imposed separately, or together:

Remedial Options

Option 1: Under Section 19-120(c)(1) of the AGS Law, the Commission could order USESC to cease and desist, or correct, 1) any patterns of deceptive sales practices and misrepresentations by its independent contractors, and 2) failures to have sufficient managerial resources and abilities to exercise control over the Company's sales, marketing, recruiting, and training. The advantage of this remedy is that it provides time to evaluate the success of any management strategy implemented by the Company under field conditions. Because this remedy does not prohibit the Company from continuing to sell its products by door to door sales or any other method, the Commission can evaluate complaint trends over a significant period of time, for example, one (1) year or for as long as the Commission finds it reasonable or necessary to ensure compliance[1]. This option, in addition, permits the Commission to exercise the further remedial action permitted under Section 19-120(c)(3) of imposing financial penalties of $30,000 per day for those violations which continue after the Commission issues the cease and desist order.

Furthermore, this remedial option satisfies Staff's concerns that the Commission exercise its authority under Section 19-120(c) of the AGS Law in a manner that permits the Commission to verify that the Company's proposed managerial changes have been implemented, that the implementation has actually corrected both the managerial failures and the corresponding marketing and customer service issues, and that such corrections are sustainable. (ICC Staff Ex. 2.0, p. 4) Staff does not believe that the evidence submitted to date provides the Commission with any certainty that these problems will not reappear subsequent to this proceeding. While Staff is concerned that relapse may occur after any remedial action undertaken pursuant to Section 19-120(c)(1) or (2), the time frame for evaluation afforded by the continuation of sales activity provides greater evidence of the implementation of appropriate managerial actions.

[1] The AGS Law does not require the Commission to provide a time limit or duration with respect to any cease and desist remedy available to the Commission under Section 19-120 of the AGS Law. That said, the Commission, however, has the discretion to limit any cease and desist it issues to a specific time period. From Staff's perspective, if the Commission does decide to limit the duration of its cease and desist order, any such time frame needs to be substantial enough to permit the Petitioners or Staff the opportunity to confirm the adequacy or sustainability of the managerial changes implemented by the Company. As Staff has testified, complaint levels are seasonal (ICC Staff Ex. 2.0, p. 15-16), so the Commission should ensure that any time frame limiting a cease and desist order covers both the winter and summer seasons.

The disadvantage of this remedial option is that door to door sales continue providing the opportunity for violations to continue, even though such violations may be subject to further penalty while the Company implements changes to its managerial controls.

Option 2: The second remedial option available to the Commission for the managerial failures identified in this brief is to require the Company, under Section 19-120(c)(3) to suspend its door-to-door sales until it has implemented new managerial policies to effectively address the problems raised by Staff and Petitioners. (ICC Staff Ex. 2.0, p. 2) Section 19-120(c)(3) gives the Commission authority to suspend a certificate of service authority for substantial or repeated violations of or non-conformances with the provisions of Sections 19-110 or 19-115 of the AGS Law. The advantage of this option is that door to door sales, which have been responsible in large part for the complaint trends identified by Staff and the other Consumer Groups, are suspended during the implementation period.

The imposition of Option 2 presents a number of disadvantages, however. First, the sales force is idled and the Company's revenues are decreased until the suspension order is lifted, putting some financial strain on the Company and the sales contractors until remediation efforts are implemented. Second, the efficacy or sustainability of the implemented remedial efforts cannot be tested during the pendency of the suspension order without sales activity. Third, the Commission's authority to impose $30,000 per day penalties under Section 19-120(c)(3) may not be invoked because a cease and desist order was not issued. Fourth, the Commission must overcome two legal hurdles in order to impose Option 2, namely, (i) satisfying the higher statutory standard of finding substantial or repeated violations of, or nonconformances with, Sections 19-110 or 19-115, as required by Section 19-120(c)(3) of the AGS Law; and (ii) supporting a cease-and-desist order of door to door sales activity under the certificate of service authority granted to the Commission by Section 19-120(c)(3) of the AGS Law.

While Staff does not believe either of these legal hurdles is insurmountable, Staff recommends that the Commission take them seriously. With respect to finding substantial or repeated violations of, or nonconformances with, Sections 19-110 or 19-115 of the AGS Law, as required by Section 19-120(c)(3), Staff believes that the evidence in this proceeding indicates “substantial” violations or nonconformances with Sections 19-110 or 19-115 of the Act due to the serious nature of the violations and nonconformances identified in this record. Moreover, the evidence indicates that significant reccurring patterns of misrepresentations about essential aspects of the service to be provided have occurred, coupled with ineffective managerial controls, over the entire Complaint Period. Thus, in Staff’s view, this evidence supports a finding of “substantial” violations or nonconformances under Sections 19-110 or 19-115 of the AGS Law.

If the Commission agrees with Staff that the record supports a finding of a “substantial” violation or nonconformance, Staff argues that nothing further is required in order for the Commission to exercise its authority under Section 19-120(c)(3). However, if the Commission seeks to rely on a statutory finding of “repeated” violations or nonconformances, Staff raises a cautionary note.

Less clear is whether or not the Commission can support a finding of “repeated” violations or nonconformances in this proceeding because the order in this proceeding represents the first determination by the Commission that these patterns of misrepresentation are a violation of the AGS Law, all other proceedings having been settled without admissions of liability. That said, the statute does not limit the authority of the Commission to impose the remedy under Section 19-120(c)(3) only after a finding of repeated violations but also permits a remedy for repeated nonconformances, presumably a lesser standard than finding repeated violations. The statutory language is disjunctive, permitting a remedy "for substantial or repeated violations of or nonconfomances with the provisions of Section 19-110 or 19-115." (220 ILCS 5/19-120(c)(3)) These alternative statutory requirements support the argument that determining "repeated nonconformances" does not require two separate hearings, one determining a nonconformance and the second determining a repeated nonconformance, as might have been intended if the statutory language was limited to finding "repeated violations." Therefore, Staff recommends that the Commission support any exercise of its authority under Section 19-120(c)(3) with a finding of either (i) "substantial" violations or nonconformances or (ii) "repeated" nonconformances.

Staff points out that the Commission should also address whether the statute permits supporting a cease-and-desist order of door-to-door sales activity under the certificate of service authority granted to the Commission by Section 19-120(c)(3) of the AGS Law. Typically, the Commission does not limit a certificate of service authority to any particular sales activity or method but merely identifies service areas. That said, the Commission has well established authority to condition its certificates of service authority, as it sees fit. This broad authority to identify conditions to certification may well justify an interpretation of the amendment and suspension authority granted under Section 19-120(c)(3) of the AGS Law to permit the Commission to suspend door-to-door sales activity until certain conditions are satisfied. This suspension is a lesser remedy than revocation and not overly drastic in comparison to the other remedial alternatives.

(See Friederich Truck Service, Inc v. Illinois Commerce Commission, 7 Ill.App.3d 468 (1972))

Furthermore, Staff believes that any procedural vehicle to determine if the Company has implemented Staff's recommendations or the Company's self-imposed managerial changes would, pragmatically, be limited to a cursory review of a verified filing by the Company of its intended actions. Other than having a confirmation of what the Company intended to do in order to comply with the Commission's order, this procedural vehicle is limited in that it could not provide the opportunity for any evaluation of the effectiveness of that compliance, or of the Company's compliance with Staff's recommendations or any of the Company's independent efforts to correct managerial issues.

For all of these reasons, Staff prefers the Commission adopt Option 1 or, if Option 2 is imposed, Staff recommends strongly that Option 2 be (i) limited to a review of a verified filing identifying the measures the Company intends to implement in compliance with the Commission's order; and (ii) coupled with the imposition of Option 1, which will permit the Commission and the parties sufficient opportunity to determine if these measures identified in the verified filing made by the Company under Option 2, are, in fact, implemented and, if implemented, are in fact adequate and sustainable.

Financial Penalties

Under either of these remedial options, Staff recommends that the Commission impose financial penalties for violations of or nonconformances with the requisite managerial certification provisions of Sections 19-110 and 19-115, as provided under Section 19-120(c)(2) of the AGS Law. Section 19-120(c)(2) grants the Commission the authority to impose financial penalties not to exceed $10,000 per occurrence. Staff recommends that the Commission find three occurrences of violations or non-conformances with the managerial requirements of certification corresponding to the managerial failures identified by Staff and discussed above. Namely, first, USESC's failure to manage its door to door sales force to ensure that consumers are not deceived, misled or otherwise confused about the offerings of the Company; second, the Company's failure to adequately identify and establish any system to properly track and respond to trends encountered in its direct consumer complaints, despite a long history of similar third party complaint trends arising out of its door to door sales methodology; and third, the Company's failure to structure its sales retention efforts to properly incent its sales force to avoid misconduct. Alternatively, the Commission may identify additional violations or nonconformances with the managerial requirements of certification based upon the failure of management to correct each of the six (6) patterns of misrepresentations described by Staff above. As a final alternative, the Commission could elect to treat the Company's managerial failures as one occurrence and impose one penalty under Section 19-120 (c)(2)(i). The disadvantage of that treatment is that the Commission subsequently cannot treat any separate failures to implement managerial changes as a separate occurrence subject to the $30,000 per day per occurrence penalty permitted under Section 19-120(c)(2)(ii) of the AGS Law.

III. COUNT V – Violations of the CFA

The Administrative Law Judge ("ALJ") has already decided that the Commission has jurisdiction to hear complaints alleging violations of the CFA, especially as it relates to an alternative gas supplier's obedience and compliance with its requirements under the AGS Law of the PUA (see generally ALJ Ruling, June 4, 2008), and consequently, this Brief treats any such issues as resolved.

The CFA specifically states:

> Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact… (815 ILCS 505/2)

Furthermore, the CFA specifically addresses complaints brought to this Commission under the PUA in Section 505/10d:

> (c) … The remedies for violations of the Public Utilities Act and its rules are not intended to replace other remedies that may be imposed for violations of this Act and are in addition to, and not in substitution for, such other remedies, nor is this Section intended to remove any statutorily defined defenses.

A. Argument

In their Complaint (p. 10), Petitioners allege that USESC engaged in different types of patterns of misconduct which rise to the level of CFA violations: fraudulently switching consumers from another gas supplier; misrepresenting contracts as "petitions for lower gas rates"; falsely promising a reduction in cost of gas; misrepresenting its affiliation with other corporations and government programs; and concealing or omitting the cost of termination fees and other material facts. While Staff did not address this Count in its testimony, Staff points out that substantial evidence has been developed in this record that support Petitioners' allegations. In Staff's view, the Company either admitted, or provided credible evidence, that it had personally identified some trends of "allegations of misrepresentation of price, savings, or identity of the sales contractor… and others [customers] complained that the exit fee calculation was not easily understood or resulted in a high exit fee." (USESC Ex. 5.0, p. 29) Company witness Potter concedes that promising customers savings would not be in compliance with

Company policy or training; "[t]his behavior would at all times be a contravention of USESC policy." (Id., p. 30)

Staff believes that the evidence shows the Company has violated the CFA and has engaged in these different patterns of misconduct. In his direct testimony, Staff witness Agnew testified to these same similar patterns of misconduct. Out of the 847 total consumer contacts which CSD received regarding USESC during the Complaint Period, 53% of them indicated that "savings" was emphasized at the point of sale. (ICC Staff Ex. 1.0, p. 6) 56% of consumer contacts indicated that termination fees were not discussed at the point of sale or were much higher than expected. (Id.) 18.2% of consumer contacts alleged that USESC agents misrepresented themselves as utility employees while .02% of them alleged misrepresentation as a government employee. (Id.) Meanwhile, 13% of consumer contacts indicated that the overall validity of the sale was suspicious, with some reporting that they had been fraudulently switched to USESC. (Id., p. 7) Consistent with CG witness Alexander's direct testimony, misrepresentation of savings was by far the largest complaint by consumers. (see CG Ex. 1, p. 7)

The crux of the CFA is that others "rely upon the concealment, suppression or omission" of a bad actor. When USESC independent contractors conceal, suppress or omit material facts with the intent that potential customers rely upon this concealment, suppression, or omission, they are violating the CFA. A majority of consumers who have complained through CSD or CUB have indicated that they sign the contract only <u>after</u> they are led to believe that they will save money on their gas bills and that the agents' statements are accurate.

CUB Exs. 3.0 and 6.0, the direct and rebuttal testimonies of Catherine Vargas, are a perfect example of an independent contractor's willingness to engage in fraud to complete a sale to earn a commission. The independent contractor in question goes above and beyond misrepresentation of material facts but actually pretends to be the customer himself. When asked if the independent contractor in this instance "was terminated after investigation and Miss Vargas's allegation demonstrated… that wrongdoing had possibly occurred," Company witness Findley stated, "Correct." (Tr. at 292/18) Ms. Findley also admitted that her investigation revealed that the customer had not in fact signed the contract in question. (Tr. at 292/1) Although the Company utilized a recorded verification process to eliminate these kinds of problems and even though the verification agent suspected as much, he still provided the independent contractor with a reservation code: "Am I speaking with her [Vargas] or someone else?" asks the verification agent. The independent contractor lies, "No, you're speaking with her." The verification agent, despite his suspicion, later states, "Perfect. We will continue the enrollment procedures… I verified the information. The fixed price reservation code is CF67293808." (Tr. at 302-304) When asked if she would "acknowledge that Mr. Grey [Vargas' independent contractor] impersonated Miss Vargas there," Company witness Findley admitted, "We have reasons to believe that he did, yes." (Tr. at 306/14) Ms. Findley goes on to agree that this verification call was a "forged verification call" (Tr. at 338/3) and that it was a "fraudulent contract" (Tr. at 338/16).

In addition, CUB Exs. 4.0 and 7.0, the direct and rebuttal testimonies of Alex Zermeno, also demonstrate misrepresentations or the concealment, suppression or omission of any material fact by the independent contractor, with intent that the customer rely upon the misrepresentation, concealment, suppression or omission of such material fact in order to execute a contract with a customer. The independent contractor misleads Mr. Zermeno into believing he is from People's Gas and that he is there to sign Mr. Zermeno up for a program to save money on gas bills. (CUB Ex. 4.0, pp. 1-2) The independent contractor speaks English with a Spanish-speaking customer, has the customer sign an English contract, and then engages the customer in an English third party verification call. Mr. Zermeno testified that he "wasn't a part of the phone [verification] call" and that the independent contractor handed him the phone and told him what to say and subsequently, told him where to sign and initial on the English contract. (CUB Ex. 7.0, pp. 1-2) When asked about the Company's policy regarding Spanish-speaking customers being marketed to by non-Spanish speaking marketers, Ms. Findley indicated that the Company's former policy was that a subsequent "presentation [would be] done in Spanish… [b]y the verification agent." (Tr. at 311/3) Ms. Findley also stated that the Company's current policy is that if a non-Spanish-speaking independent contractor felt that a Spanish-speaking customer had insufficient command of the English language, the contractor would have to cease marketing efforts to that customer. (Tr. at 311/16) Ms. Findley further confirmed that Mr. Zermeno's verification call was in English and that his contract was in English. (Tr. at 312/10) These two instances of fraud and misrepresentation with Ms. Vargas and Mr. Zermeno clearly evidence violations of the CFA.

More specifically, Staff points out that CG Ex. 3.6 summarizes allegations which the Company *has validated or determined to be accurate*. This data was specifically provided by the Company in its data request responses and admitted to by the Company. In Staff's view, if not an outright admission, this Exhibit provides credible evidence in support of Petitioners' Count V. When asked if he recollects that the

Company provided CUB with "thousands of letters that [went] to contractors with validly determined allegations informing the contractor of the potential consequences," Company witness Potter testified, "Yes, it is." (Tr. at 486/15) When further asked if he felt "confident that the allegation summary sheets accurately present the actual allegations and consequences that occurred," Mr. Potter testified, "I believe they did…" (Tr. at 490/12) The total allegations for 2007-2008 are 1146. The Company developed different categories of allegations and determined which allegations fell into which categories. The first category "Disputed Signature" implies forgery of some sort, while the "Unauthorized Signature" categories indicate someone signing the contract who was not authorized to sign it (minor signing on behalf of an adult, an employee signing on behalf of a company, etc.). Then there are 7 separate categories which the Company has listed as "Misrepresentation" categories. In CG Ex. 3.6, there are **871** total allegations under the "Misrepresentation" categories and **16** total allegations under the "Disputed Signature" category, totaling **887** instances of forgery, fraud, and/or misrepresentation. Staff believes that all of these allegations in these categories are admissions by the Company, or at least, very strong evidence as to the credibility of such allegations, as they have been deemed by the Company as validated complaints. As such, in Staff's view, these are all potential violations of the CFA.

B. Violations

Section 19-120(c)(2)(i) of the PUA allows the Commission to impose financial penalties for violations of or nonconformances with the provisions of Section 19-110 or 19-115, not to exceed $10,000 per occurrence. One of the requirements for certification is found in Section 19-110(e)(5) wherein the alternative gas supplier will comply with all other applicable laws and rules. Even though Staff did not focus its testimony on violations of the CFA, Staff believes that the evidence shows that USESC has committed 887 (871+16) violations of the CFA. Accordingly, Staff believes that the Commission has the authority to find up to 887 violations of Section 19-110(e)(5).

In the alternative, if the Commission does not find that these 887 allegations validly determined by the Company to be violations of the CFA and hence the PUA, the evidence still shows 2 violations of the CFA through the testimonies of Catherine Vargas and Alex Zermeno. The Company has further admitted the independent contractor in Ms. Vargas' situation has been terminated and that there was clearly wrongdoing revealed with Ms. Vargas' contract. Consequently, Staff recommends that the Commission, in the alternative, find that the Company has committed 2 violations of Section 19-110(e)(5).

IV. COUNT VI – Violations of the DTPA

The ALJ has already decided that the Commission has jurisdiction to hear complaints alleging violations of the DTPA, especially as it relates to an alternative gas supplier's obedience and compliance with its requirements under the AGS Law of the PUA (see generally ALJ Ruling, June 4, 2008), and consequently, this Brief treats any such issues as resolved.

The DTPA specifically states:

> (a) A person engages in a deceptive trade practice when, in the course of his or her business, vocation, or occupation, the person:
>
> (1) passes off goods or services as those of another;
>
> (2) causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
>
> (3) causes likelihood of confusion or of misunderstanding as to affiliation, connection, or association with or certification by another;
>
> (4) uses deceptive representations or designations of geographic origin in connection with goods or services;
>
> (5) represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do

> not have or that a person has a sponsorship, approval, status, affiliation, or connection that he or she does not have…
> (11) makes false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions;
> (12) engages in any other conduct which similarly creates a likelihood of confusion or misunderstanding.
>
> (b) In order to prevail in an action under this Act, a plaintiff need not prove competition between the parties or actual confusion or misunderstanding...
> (815 ILCS 510/2)

A. Argument

Again, CUB Exs. 3.0, 4.0, 6.0, and 7.0 all evidence violations of the DTPA. In the situation with Ms. Vargas, the independent contractor uses deceptive representations in connection with goods and services when he pretends to be Ms. Vargas in a verification call and presumably signs her signature on the contract. With Mr. Zermeno, the independent contractor misrepresents himself as a People's Gas employee and then engages in conduct with creates a likelihood of confusion when he engages in the sales presentation with Mr. Zermeno in English, has Mr. Zermeno sign an English contract, and has Mr. Zermeno engage in a verification call in English.

As was the case in connection with Count V, Staff did not address this Count VI in its testimony; however, in Staff's view, if not an outright admission, CG Ex. 3.6 provides credible evidence in support of Petitioners' Count VI. In CG Ex. 3.6, there are **16** total allegations falling in the "Disputed Signature" category. There are **69** total allegations falling in the "Language Barrier" category. The 7 categories of "Misrepresentation" all merit some discussion with regard to the DTPA. The category of "Misrepresentation – Identity" which totals **228** allegations falls in line with subsections (2), (3), and (4) as the independent contractor is misrepresenting his identity in some way. The category of "Misrepresentation – Prices" which totals **149** allegations falls directly in line with subsection (11) as the independent contractor might misrepresent to the customer that his gas prices are too high. The category of "Misrepresentation – Savings" which totals **232** allegations is similar in that the independent contractor might represent to the customer that he will save money if he switches to USESC. The category "Misrepresentation – Utility Affiliation" which totals **5** allegations is similar to "Misrepresentation – Identity" in that the independent contractor might represent himself to be affiliated with a particular gas utility when he is not.

The 4 categories for "Unauthorized Signature" which total **98** allegations represent the independent contractor's failure to obtain an authorized signatory to execute the contract. This falls in line with subsection (5) in that the independent contractor should know that certain people do not have the authority to enter into contracts on behalf of others and yet, the contractor allows the signature and submits the contract for processing. For instance, an independent contractor has been trained that minors or dependent children cannot execute contracts on behalf of their parents; he knows that an employee cannot execute a contract on behalf of a business owner. (see USESC Ex. 5.8, BATES USE 26; USESC Ex. 5.8C BATES USE 49) The independent contractor disregards the proper authority and pushes the contract through. While the business owner or the parent might catch the oversight upon receipt of USESC's welcome letter and calls to cancel the contract with no harm done (the customer is not even flowing yet), this does not relieve the independent contractor of liability under the DTPA for obtaining an unauthorized signature.

Staff believes that all of these allegations in these categories are admissions by the Company, or at least, very strong evidence as to the credibility of such allegations, as they have been deemed by the Company as validated complaints. As such, in Staff's view, these are all potential violations of the DTPA.

B. Violations

As indicated above, USESC is in violation of Section 19-110(e)(5) of the PUA because it is violating the DTPA. Even though Staff did not focus its testimony on violations of the DTPA, Staff believes that the evidence shows that USESC has committed **797** (16+69+228+149+232+5+98) violations of the DTPA and hence, the PUA. Accordingly, Staff believes that the Commission is authorized to find up to797 violations or nonconformances with Section 19-110(e)(5).

If the Commission does not find that these 797 allegations validly determined by the Company to be violations of the DTPA and hence the PUA, the evidence still shows 2 violations of the DTPA through the testimonies of Catherine Vargas and Alex Zermeno. The Company has further admitted the independent contractor in Ms. Vargas' situation has been terminated and that there was clearly wrongdoing revealed with Ms. Vargas' contract. In the alternative, Staff recommends that the Commission find that the Company has committed 2 violations of Section 19-110(e)(5).

V. Staff Recommendations

Staff makes the following recommendations for the Commission's consideration:

1. A finding of 3 violations of Section 19-110 and 19-115 of the PUA for violations or nonconformances with the managerial requirements of certification corresponding to the 3 managerial failures identified by Staff. In the alternative, a finding of 1 violation of Sections 19-110 and 19-115 of the PUA for a violation or nonconconformance with the managerial requirements of certification.

2. A finding of up to 887 violations of Section 19-110(e)(5) of the PUA for violating the CFA on 887 occasions. In the alternative, a finding of 2 violations of Section 19-110(e)(5) for violating the CFA with regard to Catherine Vargas and Alex Zermeno.

3. A finding of up to 797 violations of Section 19-110(e)(5) of the PUA for violating the DTPA on 797 occasions. In the alternative, a finding of 2

violations of Section 19-110(e)(5) for violating the DTPA with regard to Catherine Vargas and Alex Zermeno.

4. An imposition of financial penalties not to exceed $30,000 for the 3 violations or nonconformances with Sections 19-110 and 19-115 of the managerial requirements of certification (or, alternatively, not to exceed $60,000 for the 6 violations or nonconformances related to failures to correct trends). In the alternative, an imposition of financial penalties not to exceed $10,000 for the 1 violation or nonconformance with Sections 19-110 and 19-115 of the managerial requirements of certification.

Even if the Commission should not order any of the above recommendations, at a minimum, Staff recommends that the Commission order the Company to supplement its managerial resources and abilities by implementing the following permanent changes:

1. The third party verification has to be performed without the presence of the salesperson. The questions from the verification agent to the customer should be asked separately with pauses for an answer for each question instead of in one affirmation. Staff recommends that the Company changes its third party verification scripts to adopt these changes and Staff would like to receive copies of these scripts.

2. The management present in Illinois must effectively monitor and check the conversations of sales agents with recent allegations of misconduct.

3. Customer requests for service cancellations must be forwarded to the utility for cancellation within 2 business days of the Company receiving the request from the customer, and without any barriers beyond normal legal retention efforts. Cancellations should be done at the customer service level, not escalated or referred to some other department, such as CCR.

4. Proper tracking and escalations of complaints received directly from customers (this does not include complaints from third parties). This requires that CCR be notified of every situation or complaint alleging agent misconduct.

5. Such other changes that the Company has implemented voluntarily or otherwise believes will address the violations or nonconformances found by the Commission.

Ordering the Company to implement these minimal changes is consistent with Staff's recommendations and requiring any positive changes to be permanent may help prevent the Company from relapse. Even assuming that the Company implements its own voluntary managerial controls effectively, the Company is not required to permanently maintain the positive changes it has voluntarily implemented without a Commission order. (ICC Staff Ex. 2.0, p. 4) Furthermore, while Staff has provided the Commission with its recommended changes, ultimately, Staff believes it is the Company's responsibility to address any violations or failures to comply with the AGS Law and the PUA. The Company will have to decide what changes it is willing to undertake to comply with a Commission order and avoid penalties or other enforcement actions.

VI. Conclusion

WHEREFORE, for all of the following reasons, Staff respectfully requests that the Commission's order in this proceeding reflect all of Staff's recommendations.

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Respectfully submitted,

/s/____________________

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